LONDON-VIRGINIA MINING CO. v. MOORE AND OTHERS.*

Supreme Court of Appeals: At Richmond.

March 29, 1900.

1. APPEAL AND ERROR—*Final decree.* An order sustaining a demurrer to a bill and giving the plaintiff leave to amend in a specified time does not settle the principles of the cause, nor is it a final order until the expiration of the time specified.

Appeal from a decree of the Circuit Court of Buckingham county, rendered July 31, 1899, in a suit in chancery, wherein the appellant was the complainant, and the appellees were the defendants.

Appeal dismissed.

The opinion states the case.

D. Harmon and *F. C. Moon,* for the appellant.

A. W. Patterson and *H. D. Flood,* for the appellees.

HARRISON, J., delivered the opinion of the court.

The first question presented by the record involves the jurisdiction of this court.

The statute prescribing in what cases petition for appeal, writ of error or supersedeas may be presented to this court, is as follows:

"*Any person, who thinks himself aggrieved by an order in controversy concerning the probate of a will, or the appointment or qualification of a personal representative, guardian, curator, or committee, or concerning a mill, roadway, ferry, wharf, or landing; or any person, who is a party to any case in chancery wherein there is a decree or order dissolving an injunction, or requiring money to be paid; or the possession or title of property to be changed, or adjudicating the principles of a cause, or to any civil case wherein there is a final judgment, decree, or order, may present a petition, if the case be in chancery, for an appeal from the decree or order; and, if not in chancery, for a writ of error or supersedeas to the judgment or order*" (Code 1887, sec. 3454), except where such appeal, writ of error, or supersedeas is prohibited by sec. 3455, as amended by Acts of 1887–8, p. 17.

Under this statute there can be no appeal in the case before us unless the decree complained of has adjudicated the principles of the cause, or finally disposed of it.

The cause was heard in vacation upon the bill and demurrer thereto,

* Reported by M. P. Burks, State Reporter.

and the decree appealed from was entered sustaining the demurrer and giving the appellant leave to amend; providing further, "that unless the plaintiff shall amend the bill in sixty days from this date the same shall be dismissed at plaintiff's costs."

Without amending the bill, and before the expiration of the time allowed therefor, the plaintiff obtained an appeal to this court. We are of opinion that an order sustaining a demurrer to a bill and giving the plaintiff leave to amend in a specified time, cannot be regarded as a final order, or as settling the principles of the cause, until after the time limited therein for the plaintiff to amend his bill has expired. This question was settled by this court in the case of *Commercial Bank of Lynchburg* v. *Rucker*, 24 S. E. R., p. 388. In that case, Judge Keith speaking for the whole court, dismissed the appeal as improvidently awarded upon the ground that this court had no jurisdiction to review a decree sustaining a demurrer and granting the plaintiff leave to file an amended bill.

The only distinction between the case cited of *Bank* v. *Rucker*, and that under consideration, is, that in the former the decree sustained the demurrer and continued the cause with leave to file an amended bill, while in the latter the decree sustains the demurrer and gives leave to file an amended bill in sixty days. This difference is not material. The question is not affected by the length of time the plaintiff has in which to file an amended bill, but by the fact that the right exists. As long as the privilege of filing an amended bill can be exercised the decree is not final and the rights of the parties have not been settled. In the case at bar, as already stated, until there has been a final decree, or one settling the principles of the cause, this court cannot take jurisdiction.

For these reasons, the appeal must be dismissed as improvidently awarded. *Dismissed.*

NOTE.—The ruling of the court seems clearly justified by that in *Commercial Bank* v. *Rucker*, cited in its support.

The opinion in *Commercial Bank* v. *Rucker* cites no authority and does not assign reasons. The principal case merely follows that case, with a statement of the rule supposed to be applicable, viz., "As long as the privilege of filing an amended bill can be exercised the decree is not final and the rights of the parties have not been settled"—or, as again expressed, "An order sustaining a demurrer to a bill, and giving the plaintiff leave to amend in a specified time, cannot be regarded as a final order, or as settling the principles of the cause, until after the time limited therein for the plaintiff to amend his bill has expired."

No criticism of the actual decision in either of these cases is proposed. The

decision in each was doubtless justified by the peculiar circumstances. It is impossible to determine from the opinions what these circumstances were. The point proposed to be made is, that the court in the principal case has laid down too narrow a rule with respect to the right of appeal in the case of a sustained demurrer to a bill, with leave to amend, and has apparently confused the right of appeal from a "*final*" decree with the right of appeal from a decree "*adjudicating the principles of a cause.*" The two grounds are wholly distinct. See Virginia Code, sec. 3454.

It may be conceded for present purposes that, in the case stated, the decree is not *final* until the expiration of the grace allowed for amendment, and that therefore no appeal lies on the ground that the decree is *final.*

But where a decree *adjudicates the principles of a cause* it may be appealed from, regardless of its interlocutory character. The statute plainly so declares, and the court constantly acts upon the principle. If, therefore, a demurrer, going to the merits of the plaintiff's claim, is sustained to his bill, this is an "adjudication of the principles of the cause," and the decree sustaining the demurrer may be appealed from, even though, by reason of leave to amend, the character of finality be wanting.

Whether the action of the court in sustaining the demurrer in any case does, in fact, amount to such an adjudication, must, of course, depend upon the circumstances of each case. If, for example, the demurrer be sustained for lack of proper parties, or for other defect of form, doubtless an appeal would not lie unless the order were final. But if the demurrer go to the merits—if, for example, to a bill for the specific performance of a contract for personal services, a demurrer be sustained on the ground that such contracts are not specifically enforceable—the order sustaining the demurrer *would be* an adjudication of the principles of the cause. The addition of leave to amend might serve to preclude the character of finality, but not the character of the decree as an adjudication of the principles. Hence, in such case, there is no reason why the plaintiff should be obliged to await the expiration of the time for amendment before taking his appeal.

If the point needs further argument, suppose an analogous case, save that, instead of adjudication by a *demurrer*, there is an adjudication of the principles at the hearing, upon the *facts.*

Obviously, the circumstance that much may remain yet to be done before final decree, could not affect the plaintiff's right of appeal. Elaborate accounts and inquiries might remain to be stated and made, postponing the final decree indefinitely, yet, as soon as the decree adjudicating the principles upon which the cause is to be settled is entered, the right of appeal arises by express terms of the statute and by numerous adjudications of the court. Thus, in *Garrett* v. *Bradford*, 28 Gratt. 609, it was held that a decree overruling certain exceptions to a commissioner's report was a decree settling the principles of the cause as to the questions involved in the exceptions—from which decree the party excepting might appeal —although the report was recommitted as to other exceptions, and the decree was, therefore, interlocutory only.

In *Norris* v. *Lake*, 89 Va. 513, a deed was assailed by creditors on the two grounds that it was fraudulent on its face and fraudulent in fact. A decree deciding the deed not fraudulent on its face, and continuing the cause for further

inquiry as to the fraud in fact, was held to adjudicate the principles of the cause *to that extent*; and, for that reason, to authorize an appeal. See also *B. & O. R. Co.* v. *Wheeling*, 13 Gratt. 40; *Jameson* v. *Jameson*, 86 Va. 51; *Harper* v. *Vaughan*, 87 Va. 426, 429; *Bristow* v. *Home Building Co.*, 91 Va. 18. In the case last cited it was held (opinion by Harrison, J.), that an interlocutory order refusing to dissolve an injunction and discharge a receiver "decides in effect that the property held by the receiver is, for the present at least, in proper hands, and *to this extent* adjudicates the principles of the case." In other words, the order need not adjudicate *all* the principles in the cause, in order to be appealable. Substantially the same ruling was made in *B. & O. R. Co.* v. *Wheeling* (*supra*).

If this be the result of an adjudication by interlocutory decree on the *facts*, the same result must follow where the adjudication of the principles (or of some of them) rests upon interlocutory decree on the *law* of the case. If the plaintiff need not in the first case await finality of action, neither need he in the latter. It must follow, then, that if the demurrer to the bill go to the *merits*, so as to adjudicate the principles upon which the case is to be settled, and the demurrer is sustained, with leave to amend within a prescribed period, the plaintiff need not await the expiration of the period and the consequent finality of the order, but may appeal forthwith.

The proposition becomes the more apparent when it is considered that the plaintiff loses the benefit of his demurrer by amending. If he proposes to test the ruling on the demurrer he must seek his writ of error or appeal before amending. *Connell* v. *C. & O. R. Co.*, 93 Va. 44; *Birckhead* v. *C. & O. R. Co.*, 95 Va. 648; *Fudge* v. *Payne*, 86 Va. 303. The first two cases cited were at law, the last in equity. The principle is the same in either. The reason is the common-sense rule that the plaintiff will not be permitted to occupy the inconsistent position described in the homely phrase of "riding both sides of the sapling." When the plaintiff is, then, desirous of an appeal from the interlocutory decree sustaining the demurrer—and is unable to amend without waiving his right of appeal from the decree—no good reason can be assigned why, having elected not to amend, and having testified his election by applying for an appeal, he should be compelled to await the expiration of the time allowed for amendment.

It follows, then, that if the result of the ruling on a demurrer to a bill be to adjudicate the principles of the cause, the plaintiff against whom the ruling is is not precluded, either on principle or by the language of the statute, from his right to an immediate appeal, by reason of the circumstance that leave is given to amend within a designated time, and such time has not elapsed. The ruling in the principal case should be confined to the case where the action on the demurrer *does not adjudicate the principles of the cause.*

In *Lancaster* v. *Lancaster*, 86 Va. 201, it was held that an appeal did not lie from an interlocutory order *overruling* a demurrer to the bill; but in that case, so far as appears, the order did not settle the principles of the case.